UNITED STATES OF AMERICA
ATOMIC ENERGY COMMISSION

In the Matter of	)	
	)	Docket Nos. 50-329A
CONSUMERS POWER COMPANY	)	50-330A
(Midland Units 1 and 2)	)	

Applicant's Motion to Compel Discovery from Members of Michigan Municipal Electric Association

Pursuant to Section 2.740(f) of the Commission's Rules of Practice, 10 C.F.R. Part 2, Consumers Power Company (hereinafter "Applicant") moves to compel twenty-one municipally-owned electric systems which are members of Michigan Municipal Electric Association (hereinafter "Association"), to respond to Applicant's discovery requests in accordance with this Commission's applicable discovery rules of practice.

Applicant also requests the Board to hold oral argument on this motion, pursuant to Section 2.730(d) of the Rules.

On August 4, 1972, Applicant submitted to the Intervenors, through their counsel, an initial set of interrogatories and document requests. Applicant's covering letter made clear that it considered each of the members of the Michigan Municipal Electric Association to be subject to the discovery request. The letter also explained the need for information and from each municipal member:

> The scope of these interrogatories is comparable to that of the extensive informal discovery which has been pursued by the AEC staff against Consumers Power Company and has been made available to you and the Department of Justice. The

> purpose of the attached interrogatories is to obtain operating and other data from your clients on a fully comparable basis, as well as a full disclosure of the dealings between your clients with respect to the issues which have been raised by you and the Department of Justice in this proceeding. We would like to stress the absolute essentiality of obtaining accurate, usable and comparable data from all of the municipal and cooperative utilities in this proceeding. Absent such data, it will not be possible to develop meaningful economic studies to elucidate the issues which you and the Department of Justice have raised.

Intervenors' counsel has refused to comply with the discovery request with respect to those twenty-one members of the Association who were not individually named in the Petition to Intervene of October 4, 1971.[1/] Discussions between counsel have not resolved this issue. See Fairman to Ross letters dated August 21 and September 1, 1972; and Watson to Fairman letter dated October 11, 1972. In view of the vital nature of the information sought through the discovery requests, Applicant presses its efforts herein to obtain discovery from the aforementioned unnamed municipal systems.

1/ Five municipal systems, Traverse City, Grand Haven, Holland, Coldwater and Zeeland, are individually identified in the Petition to Intervene of October 4, 1971. The following twenty-one members of the Association were not so identified: Bay City, Charlevoix, Chelsea, Clinton, Croswell, Dowagiac, Hart, Hillsdale, Lansing, Lowell, Marshall, Niles, Paw Paw, Petosky, Portland, Saint Louis, Sebewaing, South Haven, Sturgis, Union City, and Wyandotte.

There is no justification for the refusal of twenty-one of the Association's members to respond to Applicant's discovery request. Section 2.740 b of the Commission's Rules provides in relevant part that Applicant

> ". . . may serve upon any other party . . . written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation . . . by an officer or agent, who shall furnish such information as is available to the party ." (Emphasis supplied)

Section 2.741 provides that Applicant "may serve on any other party a request to . . .[p]roduce . . . documents, . . ." (Emphasis supplied.) Applicant submits that every member of the Michigan Municipal Electric Association is a party within the meaning of the discovery rules and must therefore respond to Applicant's discovery requests.

The cases construing the word "party", as used in the federal discovery rules,[2/] adopt a functional analysis to determine whether a person must respond as a party to dis-

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2/ The wording of these sections is similar to Rules 33 and 34 of the Federal Rules of Civil Procedure. In the absence of any Commission precedent pertaining to Sections 2.740 b and 2.741, we suggest that, in adopting the language of the Federal Rules, the Commission intended to follow federal court decisions which have placed a gloss upon Rules 33 and 34.

covery requests.[3] This approach is founded on the rationale that a person with an interest in the proceeding should not be permitted to avoid discovery requests of it while at the same time utilizing the discovery process for its benefit in the name of an identified litigant.[4] In determining whether an "unnamed" person (here each of the aforementioned twenty-one members of the Association) is a "party" for these purposes, it is therefore necessary to examine the closeness of relationship between the person and the identified litigant,[5] the stake that the person has in the outcome of the pending

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3/ See, e.g., Natta v. Hogan, 392 F.2d 686 (10th Cir. 1968); Parrett v. Ford Motor Co., 47 F.R.D. 22 (W.D. Mo. 1968); Firemen's Mutual Insurance Co. v. Erie-Lackawanna R.R. Co., 35 F.R.D. 297 (N.D. Ohio 1964).

4/ See, e.g., Firemen's Mutual Insurance Co. v. Erie-Lackawanna R.R. Co., supra, at 299 (emphasis added):

> To allow plaintiff to be insulated from answering these interrogatories on the basis of lack of personal knowledge would not be in accord with the objective of the Rules.
>
> It would not be just, in that plaintiff would be entitled to obtain from defendant information which the defendant might possess as to the operative facts of the action, whereas defendant would be denied the same opportunity of inquiry to the plaintiff .

5/ Id. See also Bingle v. Liggett Drug Co., Inc., 11 F.R.D. 593 (D. Mass. 1951).

matter,[6/] and the assistance the person has or will provide the identified litigant in the conduct of the litigation.[7/]

The relationship between the Association and its municipal members in this case makes clear that the members are real parties in interest herein and that, under the standards established by the aforementioned cases, each should be subject to discovery. The Association is a participant in this proceeding solely as a representative litigating agent for the interests of its members. The Association does not engage ir, or so far as Applicant is aware, propose to engage in the generation, transmission, distribution or purchase of electric power. It has no employees; it is not itself a customer or potential customer of Applicant; in fact, it has no present or potential relationship to Applicant or to this proceeding. Significantly, the relief requested by the Association, inter alia, in the Petition to Intervene of October 4, 1971, would accrue not to its benefit, but only to the benefit of its member

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6/ See, e.g., Conversion Chemical Corp. v. Dr.-Ing. Max Schloetter Fabrik Fur Galvanotechnik, 49 F.R.D. 126 (D. Conn. 1969); Summerlin v. Kemp, 194 F. Supp. 838 (D. Md. 1961).

7/ See, e.g., Summerlin v. Kemp, supra.

systems.[8/]

Later events have confirmed that the Association's participation herein is founded solely upon its status as a spokesman for its member systems. At the Prehearing Conference, Intervenors' counsel stated (emphasis added):

> [T]he approval of the Municipal Electric Association was obtained by vote at their annual meeting to seek intervention in this proceeding and to represent the interests of all of the municipal systems in the state of Michigan who are members of that association.
>
> I think that Justice Department letter makes it clear that the interests of these small systems is the thing which is one of the key parts to this hearing (Tr. 13).

Counsel for the Justice Department in supporting the Association's Petition to Intervene also outlined the importance of this proceeding to the Michigan municipal systems generally. He stated:

> Here one question is whether or not small systems in Michigan's lower peninsula are being restrained from entering into the business of constructing, operating and selling bulk power supply from an integrated or coordinated system.
>
> And I think it would be very helpful to the proceedings of the Board to have these small

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8/ The Association's membership includes all but two of the municipal systems in Applicant's service area. Applicant does not by this Motion seek discovery against Harbor Springs and Eaton Rapids since these systems do not belong to the Association.

> systems represented by their own attorney in this proceeding. (Tr. 15).

Moreover, the Board based its decision to allow intervention of the Association upon the substantial interest which its member Michigan municipal systems generally have in the outcome in this proceeding. The Chairman concluded at that time:

> We also believe that the Department of Justice represents the interests of the public at large and does not necessarily represent the interests of small municipal utilities, and that is another basis for our ruling permitting intervention by the petitioners . (Tr. 34).
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> We also believe, based on the advisory letter of the Department of Justice, that the central figures in this case are the local municipal utilities, and consequently since they are the parties really being discussed in this proceeding they should have full right of intervention in this proceeding (Tr. 34-35). (Emphasis supplied).

The Association itself has stated that this proceeding is of vital significance to all of its members. Its October, 1971, Newsletter, which is attached to this Motion, confirms this point in some detail:

> [A]t issue in the action before the Atomic Energy Commission is the right to buy a part of a nuclear power facility; the right to wheel power over major transmission facilities; and fair and equitable wholesale power rates. Attorney Fairman [has] suggested that the affected companies should consider each utility's five or ten year future needs, reliability of service, and the effect of

> Consumers Power policy on future operations. The possible date for pre-trial hearings is estimated as January, 1972.
>
> In their report to the MMEA Board of Directors, Mr. Riemersma and Mr. Hieftje pointed out that the positive effects of this intervention would accrue to every municipal electric operation in the state, regardless of whether they were actual intervenors.
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> * * *
>
> The cost of this suit will not be small, but the issues involved should be obvious to everyone who is interested in municipal electric ownership. To put the matter on the line, this is one case that municipals and co-ops cannot afford to lose. (Emphasis added.)

In view of the applicable case law discussed above, this record compels the conclusion that the Association's members must be deemed parties to this proceeding for discovery purposes. These member systems are the "real litigant[s] here, . . . whose interests are closely connected with those of the [Association]."[9/] "For all practical purposes [the municipal members are] performing the exact functions and playing the precise role of an actual party . . . ."[10/] The municipal systems have pooled their efforts

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9/ Bingle v. Liggett Drug, Co., Inc., 11 F.R.D. 593, 594 (D. Mass 1951).

10/ Simper v. Trimble, 9 F.R.D. 598, 600 (W.D. Mo. 1949).

and resources through the Association. Through the Association they will be "entitled to obtain from [Applicant] information which [Applicant] might possess as to the operative facts of the action, whereas [Applicant] would be denied the same opportunity or inquiry [with regard] to the [unnamed systems] . . ."[11/] "That being true, [the twenty-one unnamed municipal systems] should be subject to the usual and reasonable rules . . . with respect to discovery. Otherwise they . . . by contracting with [the Association] . . . could nullify and evade the [Commission's] rules of procedure."[12/]

Therefore, Applicant respectfully requests that this Board order each municipal member of the Association to answer the discovery requests served upon it, through counsel, on August 4, 1972 and to respond to future discovery requests

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11/ Firemen's Mutual Insurance Co. v. Erie-Lackawanna R.R. Co., 35 F.R.D. 297, 299 (N.D. Ohio 1964).

12/ Simper v. Trimble, supra, at 600.

as a "party", pursuant to the Commission's Rules of Practice.

Respectfully submitted,

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October 26, 1972

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Compel Discovery have been served on the following by deposit in the United States mail this 26th day of October, 1972:

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